UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

RONALD G. CALHOUN,	)	Filed K. Stepler
Plaintiff,	)	
v.	)	**Case No. CV 499-159**
NAZARENE PUBLISHING HOUSE,	)	
Defendant	)	

RONALD G. CALHOUN,	)	
Plaintiff,	)	
v.	)	**Case No. CV 400-086**
THE SOUTHERN BAPTIST CONVENTION LIFEWAY CHRISTIAN RESOURCES, THE SUNDAY SCHOOL BOARD OF THE SOUTHERN BAPTIST CONVENTION, CONVENTION PRESS, BROADMAN & HOLMES, BAPTIST BOOK STORES, THE UNITED METHODISTPUBLISHING HOUSE, COKESBURY PUBLISHING, ABINGDON PRESS, COKESBURY STORES, WORD MUSIC, and C.A. MUSIC,	)	
Defendants.	)	

ORDER

Before the Court are defendants' motions for summary judgment (Docs. 64/92, 66/94, 67, 72 and 85). Based upon the arguments of the parties and a thorough review of the record, defendants' motions for summary judgment are granted for the reasons fully explained below.

I. STATEMENT OF FACTS

Because of the voluminous nature of this case, the Court will briefly summarize only the facts necessary for the current motions.

Plaintiff contends that he wrote the song "Before His Eyes" in 1969 and that the song "Emmanuel" is an infringement of his song. Pl.'s Statement of Material Facts at 2 (Doc. 80). Bob McGee wrote the song "Emmanuel" in 1976. Third-Party Def. C.A. Music, Inc.'s Mem. Supp. Mot. Summ. J. at 3 (Doc. 68). In 1983, C.A. Music acquired the copyright in "Emmanuel" and began to license the song to dozens of companies. Id. at 2. Plaintiff brought this suit against these companies based on alleged violations of various state and federal laws, including a claim of copyright infringement. Compl. (Doc. 1) at 1-14.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment serves to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." FED. R. CIV. P. 56 advisory committee's note, cited in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 487 (1986). It is appropriate only when the pleadings, depositions and affidavits submitted by the parties indicate no genuine issue of material fact and show that the moving party is entitled to

judgment as a matter of law. FED. R. CIV. P. 56(c). A court must view the evidence and any infernences that may be drawn from it in the light most favorable to the nonmovant. Mercantile Bank & Trust Co., Ltd. v. Fidelity & Deposit Co., 750 F.2d 838, 841 (11th Cir. 1985).

The party seeking summary judgment must first identify the grounds demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1583 n. 16 (11th Cir. 1991), cert. denied, 506 U.S. 903 (1992). Such a showing shifts to the nonmovant the burden to go beyond the pleadings and present affirmative evidence showing that a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986); Thompson, 934 F.2d at 1583 n. 16. "Factual disputes that are irrelevant or unnecessary will not be counted." United States v. Gilbert, 920 F.2d 878-83 (11th Cir. 1991) (citation omitted), and a mere scintilla of evidence supporting the non movant's position will not fulfill this burden. Walker v. Darby, 911 F. 2d 1573, 1577 (11th Cir. 1990).

III. COPYRIGHT INFRINGEMENT

To state a claim for copyright infringement, plaintiff must prove two elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1214 (11th Cir. 2000): Beal v. Paramount Pictures Corp., 20 F.3d 454, 459 (11th Cir. 1994), cert. denied, 513 U.S. 1062 (1994); Bellsouth Adver. & Publ'g Corp. v. Donnelly Info Publ'g, Inc., 999 F. 2d 1436, 1440 (11th Cir. 1993) (en banc). If plaintiff does not have direct proof of copying, the plaintiff "may show copying by demonstrating that the defendants had access to the

copyrighted work and the works are 'substantially similar.'" Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1248 (11th Cir. 1999) (quoting Benson v. Coca-Cola Co., 795 F. 2d 973, 974 (11th Cir. 1986) reh'g denied, 801 F. 2d 404 (11th Cir. 1986) (en banc). If the plaintiff cannot show access, the plaintiff may still prevail by demonstrating that the works are "strikingly similar." Herzog, 193 F.3d at 1248 (quoting Ferguson v. Nat'l Broad. Co., 584 F.2d 111,113 (5th Cir. 1978)).[1] However, proof of access and similarity "only raise a presumption of infringement which may be rebutted by proof of [defendants'] independent creation of the allegedly infringing song." Ferguson, 584 F.2d at 974.

Because it is "virtually impossible to prove copying directly, this element is usually established circumstantially, by demonstrating that the person who composed the defendant's work had access to the copyrighted material and that there is substantial similarity between the two works." Herzog, 193 F. 3d at 1249; Ferguson, 584 F.2d at 113. Once the plaintiff makes this showing, the "burden shifts to the defendant to prove that his/her work was not a copy, but rather was an independent creation." Herzog, 193 F.3d at 1249. See also Benson, 795 F.2d at 974 (stating that "proof of access and similarity [are]not enough, however, to affirmatively establish infringement. These elements only raise a presumption of infringement which may be rebutted by proof of appellee's independent creation of the allegedly infringing song.").

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[1] Fifth Circuit decisions prior to September 30, 1981 are binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

A. ACCESS

The Eleventh Circuit regards a "reasonable opportunity to view" as access. Ferguson, 584 F.2d at 113. "Reasonable opportunity does not encompass any bare possibility in the sense that anything is possible." 4 MELVILLE B. NIMMER AND DAVID NIMMER ON COPYRIGHT, § 13.02[A], at 13-19 (1999). "Access may not be inferred through mere speculation or conjecture." Id.; Ferguson, 584 F.2d at 113. "There must be a reasonable possibility of viewing plaintiff's work-not a bare possibility." Herzog, 193 F.3d at 1250 (internal quotations omitted).

Plaintiff proffers three theories in his attempt to establish that Mr. McGee had a reasonable opportunity to view "Before His Eyes." First, plaintiff alleges that he taught students from the state of Washington while he was an instructor at the Stamps-Blackwood School of Gospel Music in Kentucky and that one or more of these students procured his music and made it available to Mr. McGee. Calhoun Dep. at 110. Second, plaintiff contends that Mr. McGee heard plaintiff perform "Before His Eyes" on the radio, television or at a performance. Calhoun Dep. at 110; Pl.'s Memo Supp. Req. Deny Mot. Summ. J. (Doc. 79) at 8. Lastly, plaintiff asserts that Mr. McGee had access to "Before His Eyes" because plaintiff sent his works to Faith Music Company, which Lillenas Publishing Company purchased around 1975. Doc. 79 at 9.

i. First Theory of Access—Students at Stamps-Blackwood School

Plaintiff was an instructor at the Stamps-Blackwood School of Gospel Music in Murray, Kentucky from 1972 to 1976 or 1977. Pl's Opp'n Answer Material Facts Statement (Doc. 83) at 8; Pl's

Br. Resp. Renewed Mot. Dismiss Summ. J. (Doc. 104/73) at 9. The Stamps-Blackwood School was not a full time school, but was open in the summers for three weeks. Calhoun Dep. at 112. Plaintiff claims that he taught students from the state of Washington while serving as an instructor at this school. Doc. 80 at 4. Plaintiff theorizes that a student from the state of Washington who attended the Stamps-Blackwood School could have procured a copy of his music and returned to the King's Temple Church in Washington and shared it with Mr. McGee. Calhoun Dep. at 110. As evidence, plaintiff provides seven names and seven address of "students from the state of Washington that he taught from 1972 to 1976." Doc. 104/73 at 9. However, plaintiff does not indicate whether these seven individuals resided in Washington when he allegedly taught them during the 1972-76 time period. Plaintiff has not offered an affidavit from any of these seven individuals to substantiate his claim nor has he offered a scintilla of evidence linking any of these individuals to Mr. McGee or to anyone involved with King's Temple Church.

This theory is further weakened by Mr. McGee's statement that "no external sources influenced [his] conception and composition of the song" and that he "did not use any sheet music [or] lead sheets." McGee Decl. (Doc 50) at 3. Plaintiff has not proffered a single piece of evidence to rebut Mr. McGee's declaration and thus, has not created a genuine issue of material fact.

ii. Second Theory of Access—Broadcasts and Performances

Plaintiff contends that access can be inferred from the wide distribution of "Before His Eyes." Doc. 104/73 at 8-10. Plaintiff performed "Before His Eyes" on television three times. Calhoun Dep. at 76. He performed "Before His Eyes" on *The Warren Roberts Presents Show* once in October of 1972 and again in

September 8, 1975, which was broadcast on WHAE TV, Channel 46 in Atlanta, Georgia. Calhoun Dep. at 73. On October 6, 1972, plaintiff performed "Before His Eyes" on *The 700 Club*, which was broadcast from Portsmouth, Virginia. Calhoun Dep. at 74. Plaintiff alleges that these three performances were not local broadcasts and that all the CBN affiliate stations aired the performances. Calhoun Dep. at 75-76.

Plaintiff, however, has provided no admissible evidence to show that these three performances were aired outside of Atlanta and Portsmouth, respectively. Calhoun Dep. at 76, 216 (stating that plaintiff does not know what television stations were affiliates of the CBN network during the time of his performances). The singular piece of evidence offered by plaintiff is a letter dated October 6, 1972 from Mr. William A. Garthwaite, producer of *The 700 Club*. Doc. 80 at Exhibit L. Mr. Garthwaite explains that "*The 700 Club* goes into Calif., Conn., North Carolina, Baltimore, Md., Roanoke, Va., and Portsmouth, Va. and in Atlanta. In addition to this, the program is carried by cable into many other areas such as Florida, Louisiana, etc." Id. Most notably, Mr. Garthwaite's letter does not indicate that *The 700 Club* was available in any part of the Pacific Northwest region of the county. Furthermore, Mr. McGee stated in his declaration that he had "never seen nor heard of the televised program *'Warner Robbins presents'* . . . [and] had never seen the televised program *'The 700 Club'*" prior to writing "Emmanuel" in 1976. McGee Decl. at 4. Plaintiff has provided no evidence to refute this testimony nor has he produced any evidence that Mr. McGee visited any of these places of performance or broadcasts during the relevant time period.

Plaintiff further contends that "Before His Eyes" "was performed and promoted over radio stations, at concerts, in churches, to record companies and over The Grand Ole Opry Gospel Radio which was syndicated from Nashville, Tennessee." Doc. 83 at 8.

Again, however, plaintiff has failed to proffer evidence to support these conclusory statements that his song was accessible in the state of Washington or the Pacific Northwest. See Ferguson, 584 F. 2d at 114 (stating that such conclusory statements "are not probative evidence in a summary judgment proceeding").

For example, plaintiff offered a letter dated September 28, 2000 from Kyle Cantrell, the Operations Manager of WSM, the radio channel that broadcasts The Grand Ole Opry Gospel Radio. Doc. 104/73 at Exhibit B. In this letter, Mr. Cantrell explains that:

> While WSM's signal has been heard on every continent, the primary area in which its skywave signal has been reliably received has historically been within 1,000 to 1,500 miles of Nashville [Tennessee]. Reception of WSM in Washington state, therefore, while possible from time to time, is not likely to have occurred in the 1970s on anything resembling a consistent basis. Id.

Further, Mr. McGee stated in his declaration that he "had never heard the radio program *The Grand Ole' Opry Gospel Hour.'*" McGee Decl. at 4. Plaintiff has provided no evidence to refute this testimony.

While plaintiff claims that "Before His Eyes" received widespread publicity, the evidence does not support this assertion. Plaintiff registered "Before His Eyes" and several of his other songs with the performing rights agencies of SESAC and BMI, and he has only received in his entire musical career less

than eleven dollars ($11) in performing rights and song publishing royalties for all of his music. Calhoun Dep. at 39-40, 62. This fact strongly suggests that "Before His Eyes" has not received much airplay. Further, plaintiff paid for the album "It's Through Our Faith," the album on which "Before His Eyes" appears, and only 1200 copies of the album were produced. Calhoun Dep. at 55. Small quantities were promoted and distributed to publishers and associates in the music business. Calhoun Dep. at 55. However, plaintiff has no records of any royalties received from sales of this album. Doc. 69 at 3.

The Second Circuit has recognized that a plaintiff may establish access by proving that there has been "wide dissemination" of the copyrighted work. ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F2d 988, 998 (2d Cir. 1983) (finding access where plaintiff's song was "Number One" on the United States Billboard Charts and one of the "Top Thirty Hits" in England). Where the copyrighted work has only been published to a limited audience, however, access cannot be inferred absent evidence that the defendants has a reasonable opportunity to view the work. See Intersong-USA v. CBS, Inc., 757 F. Supp. 274, 281 (S.D.N.Y. 1991) (dismissing plaintiffs' claim of radio access where there was no proof that the defendants' songwriters heard the song); Novak v. Nat'l Broad. Co., 752 F. Supp. 164, 170 (S.D.N.Y. 1990) (holding that no genuine issue of fact regarding access despite fact that plaintiff's skits were broadcast several times on a national television show); Jewel Music Pub. Co. v. Leo Feist, Inc., 62 F. Supp. 596, 598 (S.D.N.Y. 1945) (finding no access to plaintiff's song despite the fact that 4,000 copies were distributed to various broadcasting stations and artists, and 5,626 copies, 168 orchestrations and 198 band arrangements were sold); see also Benson, 795 F.2d at 975 (finding fact that plaintiff had performed his song around the country did not establish access

where no evidence that defendant's songwriters visited any of the places or performance during the relevant time period); Selle v. Gibb, 741 F.2d 896, 902 (7th Cir. 1984) (finding no more than a bare possibility that defendants had access to the plaintiff's song where song had been performed two or three times in the Chicago area and sent to eleven publishing companies); Jason v. Fonda, 526 F. Supp. 774, 776-77 (C.D. Cal 1981) (indicating that fact that 200 to 700 copies of plaintiff's book were available in Southern California bookstores "creates no more than a 'bare possibility' that defendants may have access to plaintiff's book"), aff'd, 698 F. 2d 966 (9th Cir. 1982).

In sum, plaintiff has presented no evidence that "Before His Eyes" was ever played or broadcast in the Pacific Northwest between 1969, the time plaintiff wrote the song, and 1976, the time Mr. McGee wrote "Emmanuel." Furthermore, Mr. McGee stated that he "was not in the habit of listening to gospel music on any radio stations or television programs...[and] did not listen to recordings of Christian music" prior to 1976. McGee Decl. at 3. He "had never listened to Christian music on the radio before composing 'Emmanuel' ...[and] had never heard or seen 'Before His Eyes' or had any contact with that song whatsoever before creating 'Emmanuel.'" McGee Decl. at 3-4. Plaintiff has provided no evidence to refute this testimony.

Lastly, plaintiff has not produced any evidence that Mr. McGee heard "Before His Eyes" during one of plaintiff's performances in a church or at a concert. In fact, Mr. McGee stated that he "had never traveled to the Southeast United States," had "never been to any Baptist revivals," and had "never heard of Ronald G. Calhoun" until this lawsuit. McGee Decl. at 4. Again, plaintiff has provided no evidence to refute this testimony.

The following exchange during plaintiff's deposition summarizes the plaintiff's theory of access:

> Q: How do you contend that Mr. McGee got access to your material?
> A: My personal feeling is that he could have heard it over the CBN performances. He could have possibly attended the Stamps-Blackwood School of Music. Students came to the Stamps-Blackwood School of Music from all over the United States and other parts of the world. And there could have been someone from the King's Temple take the music back to the King's Temple that attended the Stamps-Blackwood School of Music.
> Q: But all this is conjecture. You don't have any evidence-
> A: I don't have any evidence to prove that other than where I was during the span of time prior to 1976 when they-the King's Temple claims rights to their chorus book.

Calhoun Dep. at 110

iii. Third Theory of Access--Third Party

Plaintiff claims that he sent "Before His Eyes" to Faith Music Company between 1970 and 1971. Doc. 79 at 9. Lillenas Publishing Company acquired Faith Music Company around 1975. Id. Plaintiff alleges that Mr. McGee had dealings with Lillenas and that Lillenas's alleged possession of his song is sufficient to establish access. Doc. 140/73 at 8.

The Fourth Circuit faced this issue in Towler v. Sayles, 76 F.3d 579, 582 (4th Cir. 1996). The Fourth Circuit held that "[a] mere possibility that an opportunity for [the infringer] to view or copy plaintiff's work could have arisen will not suffice. Rather, it must be reasonably possible that the paths

of the infringer and infringed work crossed." Id. at 582. The Court went on to state that "[a] court may infer that the alleged infringer had a reasonable possibility of access if the author sent the copyrighted work to a third party intermediary who has a close relationship with the infringer" and explained that "an intermediary will fall within this category, for example, if she supervises or works in the same department as the infringer or contributes creative ideas to him." Id. at 583. See also Herzog, 193 F.3d at 1252 (stating that "an inference of access based on a third party's possession of the plaintiff's work requires 'more than a mere allegation that someone known to the defendant possessed the work in question.'" (quoting Palmieri v. Estefan, No. 91 CIV-3098-RO, 1995 WL 331719, at *1 (S.D.N.Y. June 5, 1995) aff'd sub nom, on other grounds, Palmieri v. Defaria, 88 F.3d 136 (2d Cir. 1996)); Evans v. Wallace Berrie & Co., 681 F. Supp. 813, 816 (S.D. Fla. 1988) (rejecting suggestion that a reasonable possibility of access arose where a channel of communication was established between a person to whom plaintiff submitted her work, a third party, and the alleged infringer).

After scouring the record, the Court cannot find any connection between Mr. McGee and Lillenas. Mr. McGee's statement that he had "never had any relationship with any music publishers" prior to 1976 explains this void. McGee Decl. at 4. Therefore, plaintiff cannot prove access based on this third theory.

In order to conclude that Mr. McGee had access to plaintiff's song, this Court would have make several factual and logical leaps that are contrary to the record before the Court. For example, this Court would have to assume without any supporting evidence that one of plaintiff's students procured a copy of "Before His Eyes," gave it to Mr. McGee, and that Mr. McGee was not truthful when he said he had never heard of plaintiff's composition. Similarly, the

Court would have to assume, despite evidence to the contrary, that "Before His Eyes" enjoyed vast popularity in both television and radio broadcasts in the state of Washington in the early 1970s and that Mr. McGee's testimony that he did not see nor hear the song was a fabrication. Therefore, given the lack of evidence presented by plaintiff, a finding of access would be based on "impermissible speculation or conjecture," which is specifically disallowed by the Herzog decision. Herzog, 193 F.3d at 1256. In sum, no nexus exists between plaintiff and Mr. McGee that is sufficiently strong to raise a reasonable possibility of access to "Before His Eyes." Herzog, 193 F.3d at 1251; see also Ferguson, 584 F.2d at 113 (stating that "to support a finding of access there must be a reasonable possibility of access and not a bare possibility . . . .").

The Court finds that the Ferguson case is analogous to plaintiff's claims. Ferguson, 584 F2d at 111. In Ferguson, the plaintiff alleged that certain portions of her musical composition "Jeannie Michele" were used in the theme song of a television program aired in 1973 called "A Time to Love." Id. at 112. The various individuals and companies to whom she sent her composition, including NBC and BMI, rejected her work. Id. She filed a copyright infringement complaint against NBC, the network which aired the show, John Williams, the musician who composed the allegedly infringing theme song, and others. Id. The district court dismissed Mr. Williams for lack of personal jurisdiction, and NBC moved for summary judgment. Id, at 112-13. In support of its motion, NBC submitted Mr. Williams's affidavit which stated that Mr. Williams had never heard of the plaintiff nor her composition. Id. at 113. Plaintiff offered no evidence to contradict Mr. Williams's statements. Id. The district court granted NBC's motion for summary judgment and the Fifth Circuit affirmed, holding:

> To find that Williams had access, we would have to assume that (1) although BMI professed no interest in plaintiff's composition and returned the original to her, it made and kept a copy which is later allowed Williams to see, and (2) Williams was lying when he said he had never heard of the of the plaintiff's composition. Plaintiff has given us no reason to believe that either of these assumptions is true, and certainly they are not obviously compelling. Thus, a finding of access in this case would be based on speculation or conjecture, and this is impermissible.

584 F.2d at 113.

Based upon the foregoing, the Court finds that plaintiff has failed to prove that Mr. McGee had a reasonable possibility to view plaintiff's work. Having failed to prove access, plaintiff cannot establish a prima facie case for copyright infringement rendering discussion of the substantial similarity prong is moot.

IV. STRIKING SIMILARITY

Even without proof of access, plaintiff could still establish his claim of copyright infringement if he showed that the two works were not just substantially similar, but were so strikingly similar as to preclude the possibility of independent creation. Ferguson, 584 F.2d at 113. The former Fifth Circuit articulated this Circuit's rule of striking similarity in Ferguson, 584 F.2d at 113. In Ferguson, the Court held "[e]ven without proof of access, plaintiff could still make out her case if she showed that the works were not just substantially similar, but were so strikingly similar as to preclude the possibility of independent creation."

Id. (citations omitted). See also Herzog, 193 F.3d at 1249 (indicating that when a plaintiff fails to demonstrate access, plaintiff could still prevail by demonstrating that the works are so strikingly similar as to preclude the possibility of independent creation); Benson, 795 F.2d at 975 n.2 (indicating that striking similarity is similarity "so great it precludes the possibility of coincidence, independent creation or common source."); Evans, 681 F. Supp. at 818 (stating that "[s]triking similarity simply means that in human experience it is virtually impossible that the two works could have been independently created.") (citations omitted).

This rule is the "clear majority rule, adopted in such cases as Gaste v. Kaiserman, 863 F.2d 1061 (2nd Cir. 1988), which involved the well-known song 'Feelings.'" McRae v. Smith, 968 F. Supp. 559, 565 (D. Colo. 1997). In Gaste, the Second Circuit stated:

> Though striking similarity alone can raise an inference of copying, that inference must be reasonable in light of all the evidence. A plaintiff has not proved striking similarity sufficient to sustain a finding of copying if the evidence as a whole does not preclude any reasonable possibility of independent creation. . . . Thus, striking similarity between pieces of popular music must extend beyond themes that could have been derived from a common source or themes that are so trite as to be likely to reappear in many compositions.

Gaste, 863 F.2d at 1068-69.

Courts have interpreted the striking similarity standard "very stringently." McRae, 968 F. Supp. at

566. See Hofmann v. Pressman Toy Corp., 790 F. Supp. 498, 509 (D.N.J. 1990) (holding that two works would have to be virtually identical to meet this standard); Evans, 681 F. Supp. at 808 (stating that plaintiff has an "exacting burden" to prove striking similarity). Application of this stringent standard is particularly true in cases where courts have examined popular music because songs in this genre are relatively short and tend to build or repeat a basic theme. Benson, 795 F.2d at 973 n.2; Selle, 741 F.2d at 903 n.3; McRae, 968 F. Supp. at 566. When determining whether two works are strikingly similar, the Second Circuit stated that "[i]n assessing this evidence, we are mindful of the limited number of notes and chords available to composers and the resulting fact that common themes frequently appear in various compositions, especially in popular music." Gaste, 863 F.2d at 1068.

Local Rule 26.3(B)(6) mandates that all parties comply with Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure regarding the submission of a written expert report and states that such "reports must be furnished to opposing counsel and file within ninety (90) days after the filing of the last answer of the defendants named in the original complaint." Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure indicates that a party who wishes to utilize expert testimony must submit:

> [A] written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all

> publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

FED. R. CIV. P. 26(a)(2)(B).

While plaintiff repeatedly refers to the testimony of his "experts," he only attempted to comply with either Local Rule 26.3(B)(6) or Rule 26(a)(2)B) of the Federal Rules of Civil Procedure with Ms. Beth Tolliver. See Expert Witness Report (Doc. 30). Accordingly, this Court will not consider the statements of plaintiff's other witness as expert testimony.

In addition, even though plaintiff at least attempted to comply with the rules for filing an expert witness report for Ms. Tolliver, that report also fails to meet the standard required by Local Rule 26.3(B)(6) and Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. First, Ms. Tolliver did not sign the report. Rather, the signature of Ms. Tolliver appears on some personal correspondence-a letter from Ms. Tolliver to plaintiff-which plaintiff attached to the report. Second, the report does not include her qualifications nor a list of publications. Third, it does not reveal whether she was to receive compensation or in what amount. Lastly, the report does not indicate the other cases in which she has testified at trial or by deposition. Therefore, because this report fails to comply with Local Rule 26.3(B)(6) and Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure this Court cannot consider it as expert testimony.

Even if this Court were to consider statements of plaintiff's witnesses as expert testimony, plaintiff

would still fail to prove that the two works are strikingly similar. First, all of these individuals fail to filter out the nonprotectable components of the songs from the original expression that is protectable, as required by MiTek Holdings, Inc. v. Arce Eng'g Co., 89 F3d 1548, 1650 (11th Cir. 1996).

Second, while plaintiff's witnesses opine that the songs are strikingly similar or so similar as to preclude independent creation (See Doc. 104/73 at Exhibit A and Doc. 30), an issue of fact cannot be created by merely reciting the magic words "strikingly similar" and "no possibility of independent creation." McRae, 968 F. Supp. at 567. Plaintiff has not come forward with specific evidence that, filtering out the common and nonprotectable elements of these songs, they are so strikingly similar as to preclude independent creation.

As an initial matter, the lyrics are completely different. "Before His Eyes" is also considerably longer than "Emmanuel." "Before His Eyes" is in the key of F, while "Emmanuel" is in the key of C flat. Defs.' Material Facts (Doc. 69) at 4. At least 10 out of 32 notes in the melody line are different. Id. Considering that there are only seven melody notes from which to choose in a chorus, some similarity is practically inevitable. "Before His Eyes" contains an unique octave leap in the chorus, which does not appear in "Emmanuel." Calhoun Dep. at 103-04.

In contrast, in Gaste, the court found the following evidence of striking similarity:

> Gaste's expert testified not merely to common musical phrases in the songs but said that "there is not one measure of 'Feelings' [the allegedly infringing work] which . . . cannot be traced back to something which occurs in 'Pour Toi' [the allegedly original work]." He also pointed to a unique musical

> "fingerprint"-an "evaded resolution"-that occurred in the same place in the two songs. The witness said that while modulation from a minor key to its relative major was very common, he had never seen this particular method of modulation in any other composition.

Gaste, 863 F.2d at 1068 (footnotes omitted).

In this case, plaintiff has not provided such evidence of similarities of an unusual musical fingerprint that is not common to other songs. Further, plaintiff has not provided this Court with evidence of a measure by measure similarity aside from the similarities common to the genre or to church hymns in general. In short, plaintiff's evidence does not meet the strict standard set for showing that two works are strikingly similar.

At this summary judgment stage, the Court is charged with determining whether there is sufficient evidence to go to the jury on the issue of striking similarity. McRae, 968 F. Supp. at 567. The Court concludes that there is insufficient evidence that could, if believed by the jury, establish such striking similarity that access could be inferred in the absence of any actual evidence of access. See Ferguson, 584 F.2d at 114 (stating that [i]n truth the plaintiff fails to establish mimicry. A few notes do not a song make.") The evidence presented clearly does not raise a question of fact as to whether the two compositions were so strikingly similar as to preclude the possibility of independent creation.[2]

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[2] Considering the exceedingly high standard' for determining if works are strikingly similar, plaintiff appears to sabotage his own case. In his "Brief to Plaintiff in Support of Striking Similarity" (Doc. 78/110), plaintiff points out four differences that he found in "Emmanuel" that are not

V. INDEPENDENT CREATION

If a defendant can prove that he independently created a work, then he has negated any claim of infringement. Benson, 795 F.2d at 975 (holding that the uncontradicted testimony of the writers of the allegedly infringing song was sufficient to prove independent creation, fully negating plaintiff's claim of copyright infringement). "If defendant offers evidence of the independent creation, the plaintiff has the burden of proving that the defendant in fact copied the protected material." Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1375 (5th Cir. July 1981).

Mr. McGee stated in his affidavit that he "independently created 'Emmanuel' during [a] church service in May or June 1976. [He] did not use any pre-existing material as a basis for the song. [He] did not use any sheet music, lead sheets or hymnals." McGee Decl. at 3. Further, Mr. McGee asserted that "no external sources influenced [his] conception and composition of the song." Id.

Plaintiff has not contradicted this testimony and as indicated above, plaintiff bears the burden of proving that Mr. McGee did, in fact, copy plaintiff's song. Miller, 650 F.2d at 1375. Because plaintiff has offered no evidence to the contrary, no genuine issue of fact exists. Therefore, Mr. McGee's testimony constitutes uncontradicted evidence of independent creation, which fully negates any claim of infringement.

Because the Court has found that defendants have shown that there is no genuine issue of fact

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present in "Before His Eyes." Id. at 17. Furthermore, in his conclusion, he illustrates several more differences. Id. at 17018. Therefore, these two works cannot be said to be virtually identical, the standard plaintiff must meet to prove that these works are strikingly similar.

regarding access, the striking similarity of the two songs, and the question of independent creation, plaintiff has failed to meet his burden in opposing defendant's motions for summary judgment. Having failed to establish a prima facie case of copyright infringement, plaintiff's remaining claims must also fail.

Accordingly,

IT IS HEREBY ORDERED that defendant's motions for summary judgment (Docs. 64/92, 66/94, 67, 72 and 85) are granted.

IT IS FURTHER ORDERED that all remaining motions are moot.

/s JOHN P. NANGLE
UNITED STATES
DISTRICT JUDGE

Dated: February 20, 2001